APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1208

George Tribble,
Appellee,

v.

Westinghouse Electric Corp.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: November 9, 1981
Filed: February 4, 19[illegible]

Before HENLEY and ARNOLD, Circuit Judges, and NICHOL,* Senior District Judge.

NICHOL, Senior District Judge.

George Tribble brought this action against defendant, Westinghouse Electric Corporation, (Westinghouse) claiming

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* Fred J. Nichol, Senior District Judge, District of South Dakota, sitting by designation.

that Westinghouse discharged him and failed to hire him because of his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. sections 621-34 (1976). The district court, the Honorable H. Kenneth Wangelin presiding, entered judgment in favor of Tribble following a jury trial. Westinghouse appeals from the judgment and from an Order entered by the district court denying Defendant's Motion for Judgment in Accordance with Defendant's Motion for a Directed Verdict, or in the Alternative, Motion for a New Trial. The district court's Order was conditioned upon filing by plaintiff of a remittitur and is reported at 508 F.Supp. 14 (E.D. Mo. 1980). Plaintiff filed the remittitur. For reasons set out more fully herein, we affirm.

Plaintiff Tribble first joined Westinghouse in 1964. Tribble continued in the employ of Westinghouse until his termination effective July 31, 1978. During his tenure at Westinghouse plaintiff's work experience encompassed sales or development work involving many different Westinghouse products. Westinghouse is divided into three companies, the Power Systems Company, the Industrial Products Company, and the Public Systems Company, as well as numerous divisions and groups within those three companies. Tribble was considered a "generalist" within a separate marketing group, the Business Development Department (BDD). The BDD was a group within the Industrial Products Company.

The BDD's function was three-fold: to maintain contact and involvement with key people at high-potential construction firms in order to increase Westinghouse's share of the market; to coordinate Westinghouse selling activities in the construction field through the use of business development teams to pool information on current projects; and to act as a resource for construction-involved divisions of Westinghouse by providing an informed overview of the marketplace and by giving assistance in reaching the appropriate markets. Tribble's basic duty as a business development representative was to search out

planned or potential customers for the purchase of Westinghouse products.

In December, 1977, Tribble was first informed that his position would be terminated due to an ostensible intra-company reorganization that would transfer the BDD from the marketing group of the Industrial Products Division to the construction group of the Public Systems Company. Tribble was to be terminated effective February 1, 1978, but remained on the payroll through July of 1978. During the interim between the December date upon which Tribble was informed of his pending termination and the actual termination date of July 31, 1978, Tribble applied for a number of different positions within the Westinghouse organization. Each position was filled by a younger person. The only option presented to Tribble was to either be terminated or take early retirement. Tribble chose early retirement under protest. The jury found that Tribble's age was a determining factor affecting Westinghouse's decision to terminate and not rehire Tribble and awarded him damages in the amount of $55,711. The jury award was subsequently reduced by remittitur to a sum of $44,435.

On appeal Westinghouse raises several assignments of error. Those assignments of error can be divided into two groups for discussion. One group involves the trial court's denial of Westinghouse's motion for directed verdict and motion for judgment in accordance with defendant's motion for a directed verdict, or in the alternative, motion for a new trial. The other group involves challenges to certain jury instructions. We will address first Westinghouse's challenge to the district court's denial of its various motions.

Westinghouse contends that the district court erred when it failed to grant Westinghouse's motion for a directed verdict because plaintiff did not come forward with any evidence that the reasons given by Westinghouse for the complained of actions were pretextual. Westinghouse has reiterated substantially

the same argument in its challenge to jury Instruction No. 8.[1] Jury Instruction No. 8 refers to the discharge issue while Westinghouse prefers to characterize the entire cause as one involving failure to hire. Westinghouse's motion following the trial was essentially one for judgment notwithstanding the verdict and will be treated as such a motion for the purpose of this discussion.

The standard for granting judgment notwithstanding the verdict is the same as that for a directed verdict. *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1235 (8th Cir. 1980); *Schneider v. Chrysler Motors Corp.*, 401 F.2d 549, 554 (8th Cir. 1968). The district court should grant a motion for

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[1] Instruction No. 8 stated: Plaintiff bases his suit on the Age Discrimination in Employment Act of 1967, which Congress enacted to prohibit arbitrary age discrimination in employment and to promote the employment of older persons on the basis of their ability. The Act further provides that the prohibitions against such arbitrary age discrimination in employment are limited to individuals who are at least forty (40) years of age but less than sixty-five (65) years of age.

Not every discharge of a person between the ages of forty and sixty-five is unlawful under the Act. The Act provides in part that it shall not be unlawful for an employer to discharge an older employee within this age bracket among certain conditions. One of them is where the differentiation is based upon reasonable factors other than age.

If the termination of the plaintiff was for bona fide business or economic reasons in which age was not a determining factor, there can be no violation of the law, and the discharge would be lawful.

The plaintiff in this action has the burden of showing by a preponderance of the proof that he was discharged from his job because of his age. It is the contention of the defendant in this case that the discharge was for bona fide and business reasons unconnected with age.

If you find that the termination was for the reason asserted by defendant, that would be the end of your investigation and you should cease your deliberations and return a verdict for the defendant in the case.

directed verdict "only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Smith v. Hussmann Refrigerator Co.*, 619 F.2d at 1235, *citing Barclay v. Burlington Northern, Inc.*, 536 F.2d 263, 267 (8th Cir. 1976). As this Court has noted,

> (A) motion for directed verdict is properly denied where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions. • • • In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party.

Id.

In the present case plaintiff clearly established a prima facie case of age discrimination in that (1) plaintiff was in the protected class; (2) that during the period Westinghouse confronted plaintiff with the alternative of early retirement or termination; (3) that plaintiff took early retirement under protest; and (4) that, after the discharge and plaintiff's application for other positions for which he was qualified, the position remained open and the employer continued to seek applications from persons with similar qualifications. *See Cleverly v. Western Electric Co.*, 594 F.2d 638, 641 (8th Cir. 1979); *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959 (8th Cir. 1978); *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271, 1272 (8th Cir. 1978); *Walter v. KFGO Radio*, 518 F.Supp. 1309, 1313 (D. N.D. 1981).

Westinghouse offered evidence of a legitimate nondiscriminatory reason for discharging plaintiff, that is, Westinghouse claimed that plaintiff elected to take early retirement due to an intra-company reorganization that eliminated plaintiff's job. The mere fact that Westinghouse articulated a legitimate nondiscriminatory reason for its discharge of plaintiff does not mean that Westinghouse is entitled to have a verdict directed in its favor. "(T)he articulations of a legitimate non-

discriminatory reason is sufficient to insulate an employer from a verdict against it, *i.e.*, it dispels the adverse inference from a plaintiff's prima facie case. The jury in its consideration of all the evidence may still find that the wrong occurred in the manner established by plaintiff." *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir. 1981). We believe that the jury accepted plaintiff's version of the case and thus considered the reasons offered by Westinghouse for plaintiff's discharge to be merely pretextual.

In an action brought under the ADEA, the ultimate burden shouldered by a plaintiff is that age was a determining factor in his or her discharge. *Cleverly v. Western Electric Co.*, 594 F.2d at 641; *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d at 960; *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315-17 (6th Cir. 1975). Tribble began his employment with Westinghouse in 1964, and his Westinghouse work experience encompassed sale or development of all products in Westinghouse's construction line. He remained continuously employed until the effective date of his termination, July 31, 1978. During his employment with Westinghouse, plaintiff held a number of jobs including contract sales manager, territory sales manager and business development representative. Tribble was promoted and received salary increases. On December 16, 1977, Tribble received a telephone call from the zone manager in Houston, Texas, informing him that his position with Westinghouse would be terminated on January 31, 1978. At that time the entire construction industry was facing increasingly difficult financial difficulties. At the same time, other younger persons were hired by Westinghouse to fill positions substantially similar to that held by Tribble within the corporation. Evidence was presented from which the jury could infer that the reason for plaintiff's discharge was age. Westinghouse contended at trial that the decision to eliminate Tribble's position was based upon the intra-company reorganization. We believe that the jury could reasonably believe that age, as well as the ostensible reorganiza-

tion, was a determining factor in Westinghouse's decision to eliminate Tribble's position and not hire Tribble into any other available job. We think that the district court properly denied Westinghouse's motions for directed verdict and for judgment in accordance with defendant's motion for a directed verdict, or in the alternative, a new trial.

Westinghouse also challenged a number of jury instructions. Stated simply, Westinghouse alleges that Instruction No. 2 is erroneous on the following grounds: it incorrectly stated the fact issues to be decided by the jury; it was misleading and confusing; and stated issues as to which no evidence was presented.[2] Westinghouse also objects to Instruction No. 7 for substantially the same reasons.[3] Additionally, Westinghouse objects to giving

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[2] Instruction No. 2 stated: Your verdict must be for plaintiff George Tribble if you believe: *First,* that plaintiff George Tribble was in the protected class between the ages of forty and sixty-five years from December, 1977 through July 31, 1978, *Second,* that during that period defendant confronted plaintiff with the alternatives of early retirement or termination, *Third,* that plaintiff took early retirement under protest, and *Fourth,* that plaintiff's age was a determining factor affecting the decision made by defendant to confront plaintiff with the alternatives of early retirement or termination.

[3] Instruction No. 7 stated: If you find that plaintiff George Tribble's age was a determining factor affecting the decision made by defendant to present plaintiff George Tribble with the alternatives of early retirement or termination, then your verdict must be for plaintiff George Tribble even if you believe that other factors were also present.

The Age Discrimination in Employment Act of 1967, as amended, under which plaintiff George Tribble has brought his claim against defendant, was enacted by Congress for the purposes of prohibiting discrimination in employment on the basis of age and of requiring that employment decisions with respect to older persons be made on the basis of their abilities. The Act provides in part, "it shall be unlawful for an employer to discharge or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age."

If you find that age was a determining factor affecting plaintiff's discharge, then you must consider the question of damages.

both Instructions No. 2 and No. 7, asserting that because both instructions are verdict directors for plaintiff, when read together the instructions are inherently inconsistent and contradictory.

When considering a challenge to jury instructions, the "general rule is that the instructons must be read as a whole and considered in light of the entire charge." *King v. State Farm Life Insurance Co.*, 448 F.2d 597, 600 (8th Cir. 1971). *See also Grinder v. Southern Farm Bureau Casualty Insurance Co.*, 590 F.2d 741, 743 (8th Cir. 1979); *Simpson v. Norwesco, Inc.*, 448 F.2d 1007, 1013 (8th Cir. 1971). When the charge is considered as a whole, it should state the "governing law fairly and correctly" and should not be "inflammatory or unfair or prejudicial" to either plaintiff or defendant. *Hartman v. United States*, 538 F.2d 1336, 1346 (8th Cir. 1976). Where the instructions, considered as a whole, adequately and sufficiently state the generally applicable law, the fact that the instructions are technically imperfect or are not a model of clarity does not render the charge erroneous. *See e.g. Shelak v. White Motor Co.*, 581 F.2d 1155, 1161 (5th Cir. 1978) (mere technical imperfection); *Garnatz v. Stifel, Nicholas & Co.*, 559 F.2d 1357, 1362 (8th Cir. 1977) (instructions not a model of clarity).

In the present case, the district court's charge to the jury did include a correct statement of the applicable law. Instruction No. 2 set forth the elements that the plaintiff must prove to establish a case of age discrimination. In fact, Instruction No. 2 was altered by the trial court on the basis of Westinghouse's objection to require the jury to find that age was more than a mere factor affecting defendant's decision to confront plaintiff with the alternatives of early retirement or termination. The jury was instructed that they must find that age was a *determining* factor affecting Westinghouse's decision with regard to plaintiff's employment. The charge, as presented to the jury, is an accurate statement of the applicable law. *See Cleverly v. Western*

Electric Co., 594 F.2d 638, 641 (8th Cir. 1978); *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 960 (8th Cir. 1978); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975).

Instruction No. 7, unlike Instruction No. 2, did not list the elements of a prima facie case that a plaintiff must prove in an age discrimination case. Instruction No. 7 merely described the Age Discrimination in Employment Act and the Congressional purposes behind the act. When the instructions are read as a whole this Court cannot say that the presence of both instructions in the jury charge led to any misunderstanding or confusion. Nor are Instructions No. 2 and No. 7 inherently inconsistent or contradictory.

Both Instructions No. 2 and No. 7 are verdict directors for plaintiff. Westinghouse contends that the giving of a second verdict director prejudicially emphasized plaintiff's case. It is true that this Court has held that "(a) trial court should not needlessly repeat statements respecting theories or defenses if the effect is argumentative or tends to mislead or influence a jury." *Halladay v. Verschoor*, 381 F.2d 100, 113 (8th Cir. 1967), *citing White Auto Stores v. Reyes*, 223 F.2d 298, 305 (10th Cir. 1955). "In fact, a court should go as far as possible to avoid giving undue emphasis or prominence to a particular issue or theory." *Id.* In *Halladay v. Verschoor, supra*, the trial court repeated a theory in seven consecutive instructions. In the present case, the instructions that Westinghouse claims are repetitious appear only twice in the charge and are not consecutive. Furthermore, the case *sub judice* is more analogous to *White Auto Stores v. Reyes* than it is to *Halladay v. Verschoor*.

In *White Auto Stores v. Reyes, supra*, the "instructions objected to were statements of the law relating to the liability of an employer for the acts of his employee. There (was) no suggestion that the instructions did not correctly state the law on the subject." *White Auto Stores v. Reyes*, 223 F.2d at 305.

Although Westinghouse did object to the instructions in this case, those instructions are nonetheless correct statements of the applicable law. Furthermore, both instructions were necessary for a proper disposition of the case. We hold that the trial court did not needlessly repeat any theories in the instructions, and did not unduly emphasize plaintiff's case.

Westinghouse challenges the trial court's damage instructions alleging that those instructions were inconsistent, conflicting, unfairly repetitious, confusing and misleading. Instruction No. 3 deals with plaintiff's discharge from employment.[4] Instruction No. 4 dealt with damages that flowed from Westinghouse's failure to hire.[5] Our reading of the record indicates that there is evidence from which the jury could infer that age was a determining factor in both the decision to discharge Tribble from his then current position and not to hire Tribble for any of the other jobs available at Westinghouse for which Tribble was ostensibly qualified. Our reading of the record further indicates that the employment decisions made by Westinghouse with

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[4] Instruction No. 3 stated: If you find that plaintiff George Tribble was discharged because of his age, then you must award plaintiff back pay in the amount that he would have earned had he not been discharged, from the date he was discharged until the date of this trial, reduced by the amount of benefits and earnings from other employment received by plaintiff during that time.

[5] Instruction No. 4 stated: If you find by a preponderance of the evidence that plaintiff's age was a determining factor in plaintiff's not obtaining the job of (sic) with Westinghouse and in violation of the statute, then you should consider the amount of damage to be awarded. Plaintiff is entitled to back pay in the amount he would have earned had he continued to be employed until he reached 65 years of age, less the amount of benefits and earnings from other employment or pension benefits received by plaintiff during that time.

The amount of back pay which plaintiff would have earned had he continued to be employed by defendant until he reached 65 years of age must be reduced by the amount which plaintiff could have earned had he sought alternative employment with reasonable diligence.

regard to Tribble are not divisible and in order to explain fully the plaintiff's case to the jury it was necessary to present both the discharge and failure to hire theories. Again the district court's instructions must be read as a whole, the instructions must state the applicable law fairly and accurately and not be inflammatory or prejudicial. When Instructions No. 3 and No. 4 are considered in such a light, it is clear to this Court that no prejudicial error can be found. Whatever error might have been present was corrected by the trial court when it denied Westinghouse's motion for a new trial conditioned on plaintiff's filing of a remittitur.[4] We believe, as did the trial court, that the instructions given the jury set forth a full statement of the applicable law and adequately cover all issues raised at trial.

Plaintiff has asked this Court to enter an award of attorney's fees or grant appellee time to file a motion for attorney's fees. Counsel for appellee is directed to file a motion with the clerk of this court for attorney's fees on appeal. *See* Local Rule 17.

The judgment of the district court is in all respects affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[4] The jury awarded plaintiff $55,710 in lost wages and did not return a verdict in plaintiff's favor on the question whether Westinghouse wilfully violated the statute. The trial court conditioned its denial of a new trial upon the plaintiff's filing of a remittitur in the amount of $11,275, the amount that plaintiff earned from part-time jobs during the period covered by the lost wages award. *Tribble v. Westinghouse Electric Corp.*, 508 F.Supp. 14, 16 (E.D. Mo. 1980).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-270 C (1)

George Tribble,
Plaintiff,

vs.

Westinghouse Electric
Corporation,
Defendant,

MEMORANDUM AND ORDER

(Filed May 30, 1980)

This matter is before the Court upon defendant's motion for judgment in accordance with defendant's previous motion for a directed verdict filed at the close of all evidence herein, and defendant's alternative motion for a new trial.

The Court cannot agree with defendant's assertion that viewing the evidence in the light most favorable to plaintiff and giving plaintiff the benefit of all reasonable inferences, there was not sufficient evidence to support a verdict on behalf of plaintiff on his claim brought pursuant to the Age Discrimination In Employment Act (ADEA), 29 U.S.C. §621 *et seq.* Nor does the Court believe that the instructions given the jury did not set forth a full statement of the applicable law and adequately cover all issues raised at trial. The Court perceives no fundamental injustice in the instructions given. *See Grinder v. Southern Farm Bureau Casualty Ins. Co.*, 590 F.2d 741, 743 (8th Cir. 1979); *Hartman v. United States*, 538 F.2d 1336, 1346 (8th Cir. 1976).

There exists, however, a problem in the jury's assessment of damages. The jury awarded plaintiff Fifty Five Thousand Seven Hundred and Ten Dollars ($55,710.00) in lost wages, and did not return a verdict in favor of plaintiff on the issue of liquidated damages. The only evidence the jury could have considered in arriving at the above verdict was evidence that plaintiff was receiving Two Thousand Ninety Five Dollars ($2,095.00) per month when he left defendant's employ, that he would have received such salary for another eighteen months, and that as a result of leaving at that particular time plaintiff's pension was reduced by One Hundred Dollars ($100.00) per month. Additional evidence indicated that the average number of pension checks received by a company employee at normal retirement was one hundred and eighty. It seems beyond cavil that the jury assessed damages as follows:

$2,095.00 x 18 months	= $37,710.00
100.00 x 180 months	= $18,000.00
Total	= $55,710.00

Instruction number 4 directed the jury to deduct from their award benefits and earnings received by the plaintiff from the date he left Westinghouse until he reached sixty five years of age.

The evidence is undisputed that plaintiff performed no work for defendant after January 31, 1978, went off defendant's payroll on July 31, 1978, and plaintiff received pension benefits from defendant commencing September 1, 1978 in the amount of Three Hundred and Eighty Dollars ($380.00) per month. Plaintiff reached the age of sixty five on January 15, 1980. At that time, pursuant to defendant's pension plan, plaintiff's retirement would have been mandatory. *But see,* 29 U.S.C. § 623(f)(2). The issue of mandatory retirement pursuant to the pension plan is not before the Court, since plaintiff's termination and unsuccessful attempts to obtain other jobs with defen-

dant precluded such an outcome. Nor may the lost wages recovery period be extended beyond age sixty five. This Court has held that the 1978 Amendments to the ADEA which have (1) extended the protection of the Act from age sixty five to age seventy, 29 U.S.C. §631(a), and (2) prohibited involuntary retirement because of age pursuant to a bona fide employee benefit plan, up to age seventy, 29 U.S.C. §623(f)(2) are not to be applied retroactively. *EEOC v. Florissant Valley Fire Protection District,* 21 FEP Cases, 973, 21 E.P.D. ¶30,520 (E.D. Mo. 1979); *See Also Marshall v. Delaware River & Bay Authority,* 471 F.Supp. 886 (D.Del. 1979). Plaintiff ceased performing services for defendant January 31, 1978 and was officially administratively terminated on that day, though he continued to receive his salary until July 31, 1978. *See Moses v. Falstaff Brewing Corp.,* 525 F.2d 92, 94-95 (8th Cir. 1975). The 1978 amendments to the ADEA became effective April 6, 1978. Pub. L. No. 95-256, §3(a), 92 Stat. 189. Therefore, since plaintiff's cause of action accrued prior to the effective date of the Amendment to 29 U.S.C. §631(a) raising the upper age limitation to seventy, his cause of action is governed by the age sixty-five limitation. This precludes his claim for reinstatement.

Though plaintiff's pension benefits were vested, he had no entitlement to receive them while he remained in defendant's employ. Had plaintiff remained in defendant's employ, he would not have received any benefits until mandatory retirement at age sixty five. By virtue of defendant's violation of the Act, plaintiff received eighteen months of pension benefits totaling Six Thousand Eight Hundred and Forty Dollars ($6,840.00). Plaintiff's recovery should only return him to the financial position he would have enjoyed, but for the involuntary termination. The jury properly included in its award the pecuniary loss suffered by plaintiff because he was not able to work to age sixty five and thereby maximize his pension benefits. As such, the "interim" pension benefits must be deducted from the lost wages award as they are, on the circumstances of this case, virtually identical to severance pay.

Laugeson v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975) (severance pay); *Cf. Coates v. National Cash Register Co.*, 433 F.Supp. 655, 663 (W.D. Va. 1977); *Monroe v. Penn-Dixie Cement Corp.*, 335 F.Supp. 231, 234-235 (N.D. Ga. 1971).

Plaintiff's pension benefits from General Electric need not be deducted since payment of those benefits was not occasioned by plaintiff's termination. Plaintiff merely elected to begin receiving them in January of 1978.

Amounts which plaintiff earned from other employment were not deducted by the jury though they were required by instruction number 4 to do so. The testimony indicated that plaintiff's earnings from part-time jobs during the period covered by the lost wages award totalled at least Forty Four Hundred and Thirty Five Dollars ($4,435.00). The evidence is somewhat inconsistent as to when plaintiff was re-employed by Ranken Technical Institute and the Court has included in the above total Eight Hundred Twenty Five Dollars ($825.00) for approximately eleven weeks work between November 20, 1979 and February 7, 1980 at Seventy Five Dollars ($75.00) per week. Plaintiff's part-time earnings must be deducted from the lost wages award. *Laugeson, supra,* at 317-318; *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 373 (8th Cir. 1974); *Coates, supra,* at 663; *Bishop v. Jelleff Assocs.*, 398 F.Supp. 579, 597 (D.D.C. 1975); *Monroe, supra,* at 234-235.

Though the employment plaintiff eventually found was not comparable to his former position with defendant, there is sufficient evidence to support the jury's determination that plaintiff made adequate attempts to seek other employment and mitigate his damages.

The Court considers the jury's award of damages excessive in the sum of Eleven Thousand Two Hundred Seventy Five Dollars ($11,275.00). It is well settled that a trial court may condition denial of a motion for new trial, where the damages awarded are clearly excessive, upon the filing of a remittitur by

the recovering party. *See* 11 Wright & Miller, *Federal Practice and Procedure,* §2815 (1973).

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for judgment in accordance with its previously filed motion for a directed verdict be and is DENIED: and

IT IS FURTHER ORDERED that defendant's motion for a new trial be and is DENIED upon the condition that within thirty (30) days of service of this Order plaintiff file herein a remittitur in the sum of Eleven Thousand Two Hundred Seventy Five Dollars ($11,275.00) thereby consenting to assessment of damages in the sum of Forty Four Thousand Four Hundred and Thirty Five Dollars ($44,435.00) upon the verdict returned herein and execute and file a release in favor of defendant to the extent of the Eleven Thousand Two Hundred and Seventy Five Dollars ($11,275.00) remitted upon the judgment and verdict of Fifty Five Thousand Seven Hundred and Ten Dollars ($55,710.00); however, if such remittitur and release is not filed within thirty (30) days of service of this Order defendant's motion for a new trial will be granted, the judgment entered upon the verdict will be vacated and a new trial will be ordered solely on the issue of damages.

Dated this 30th day of May, 1980.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX C

AGE DISCRIMINATION IN EMPLOYMENT ACT
29 U.S.C. Sections 621-634

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment:

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons:

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

Employer practices

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Employment agency practices

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

Labor organization practices

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Opposition to unlawful practices; participation in investigations, proceedings, or litigation

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Printing or publication of notice or advertisement indicating preference, limitation, etc.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

Lawful practices; age as occupational qualification; other reasonable factors: seniority systems; employee benefit plans; discharge or discipline for good cause

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to inovluntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power—

Delegation of functions; appointment of personnel; technical assistance

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

Cooperation with other agencies, employers, labor organizations, and employment agencies

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

Attendance of witnesses; investigations, inspections, records, and homework regulations

(a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Same; filing of charge with Secretary; timeliness; conciliation, conference, and persuasion

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Statute of limitations; reliance in future on administrative rulings, etc.; tolling

(e)(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this chpater, and may establish such reasonable exemptions to and from any or all provions of this chapter as he may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however,* That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

§ 631. Age limits

Individuals at least 40 but less than 70 years of age

(a) The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Employees or applicants for employment in Federal Government

(b) In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

Bona fide executives or high policymakers

(c)(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

Employees serving under contracts of unlimited tenure at institutions of higher education

(d) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing

for unlimited tenure) at an institution of higher education (as defined by section 1141(a) of Title 20).

§ 632. Annual report to Congress

The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this chapter, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as he may deem pertinent.

§ 633. Federal-State relationship

Federal action superseding State action

(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

Limitation of Federal action upon commencement of State proceedings

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced

under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

Federal agencies affected

(a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement by Civil Service Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission; compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions; bona fide occupational qualification

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Civil actions; jurisdiction; relief

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

Same; notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

Duty of Government agency or official

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

Applicability of statutory provisions to personnel action of Federal departments, etc.

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631([illegible] of this title and the provisions of this section.

Study and report to President and Congress by Civil Service Commission; scope

(g)(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.